

SUPREME COURT OF WYOMING

Jensen v. State

116 P.3d 1088 (Wyo. 2005) · No. No. 04-81 · Decided August 4, 2005

SUMMARY

The Supreme Court of Wyoming affirmed Zachary Dwight Fiske Jensen’s convictions for two counts of aggravated assault arising from threats involving a knife against his girlfriend and their son. The court held that limiting cross-examination about a related guardianship dispute did not violate the Confrontation Clause and that testimony concerning the victims’ emotional states was admissible. The court found that the prosecutor’s repeated questions asking Jensen whether other witnesses were lying were improper, but concluded the misconduct was harmless.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                           |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Wyoming                                                                                                                                                                                                                                                                                                                                  |
| WRITING FOR THE COURT | Hill, C.J.; Golden, J.; Kite, J.; Voigt, J.; Burke, J.                                                                                                                                                                                                                                                                                                    |
| JURISDICTION          | Wyoming                                                                                                                                                                                                                                                                                                                                                   |
| DECIDED               | August 4, 2005                                                                                                                                                                                                                                                                                                                                            |
| DOCKET                | No. 04-81                                                                                                                                                                                                                                                                                                                                                 |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Jensen appealed judgments and sentences following jury convictions on two counts of aggravated assault and battery. He challenged restrictions on cross-examination, admission of victim-impact testimony, prosecutorial misconduct, and cumulative error.                                                                                                |
| STANDARD OF REVIEW    | The limitation of cross-examination was reviewed for abuse of discretion. The unpreserved victim-impact and prosecutorial-misconduct claims were reviewed for plain error. The court assessed prejudice by asking whether, based on the entire record, a reasonable possibility existed that the verdict would have been more favorable absent the error. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                                                                            |
| PARTIES               | Zachary Dwight Fiske Jensen v. The State of Wyoming                                                                                                                                                                                                                                                                                                       |

TOPICS

criminal procedure

sixth amendment

right to counsel

impeachment

harmless error

## PRACTICE AREAS

criminal law

criminal procedure

evidence

constitutional law

appellate procedure

## QUESTIONS PRESENTED

1. Whether the trial court violated Jensen's Sixth Amendment right of confrontation by limiting his cross-examination of Spears about a guardianship and custody dispute, and whether the court erred in denying a new trial on that basis.
2. Whether testimony and argument concerning Spears's and S.O.'s emotional states constituted improper victim-impact evidence and plain error.
3. Whether the prosecutor committed misconduct by repeatedly asking Jensen whether Spears and an investigating officer were lying or not telling the truth.
4. Whether cumulative error required reversal of Jensen's convictions.

## HOLDINGS

1. The trial court did not abuse its discretion or violate Jensen's Sixth Amendment right of confrontation by prohibiting inquiry into Spears's later guardianship and custody proceedings because Jensen failed to demonstrate that the evidence was relevant to a motive to fabricate her testimony.
2. The testimony concerning Spears's and S.O.'s emotional states during the assault and immediately afterward was relevant and admissible, and its admission did not constitute plain error.
3. It is prosecutorial misconduct and error for a prosecutor to cross-examine a criminal defendant using 'were-they-lying,' 'not telling the truth,' or equivalent questions about contradictory testimony, under any circumstance; a defendant cannot open the door to such questioning.
4. The prosecutorial misconduct was harmless and did not require reversal because, considering the entire record, there was no reasonable possibility that the verdict would have been more favorable to Jensen absent the improper questioning.
5. Cumulative error did not warrant reversal because the court found only one harmless error and no other errors, prejudicial or otherwise.

## KEY QUOTATIONS

*"For these reasons, we hold "were-they-lying" questions are improper under any circumstance."* (116 P.3d at 1097)

*"The proper approach for a prosecutor is to ask the defendant "what other witnesses had to say [and allow] the jury to draw its own conclusions" and then make a proper closing argument based on the testimony."* (116 P.3d at 1097)

## FACTUAL BACKGROUND

Jensen lived with his girlfriend, Kate Spears, and their young son, S.O., in Gillette, Wyoming. During an argument, Jensen physically confronted Spears, obtained a knife, positioned himself between Spears and the apartment door, and threatened to kill Spears, S.O., and himself. Spears escaped with S.O. and called 911; a responding officer observed both of them distressed, and S.O. spontaneously stated that Jensen had tried to hurt him and cut himself. Jensen admitted obtaining a knife but claimed he threatened only suicide and acted in self-defense when he pushed Spears.

## PROCEDURAL HISTORY

Jensen was charged with two counts of aggravated assault and battery arising from threats to use a knife against Spears and S.O. A jury found him guilty on both counts. After the Supreme Court of Wyoming decided *Hannon v. State*, the district court sua sponte held a hearing on whether a new trial was warranted based on the limitation of Jensen's cross-examination of Spears, but denied a new trial. Jensen appealed, and the Supreme Court affirmed.

## DISPOSITION

affirmed

## CASES CITED

- *Hannon v. State*, 2004 WY 8, 84 P.3d 320 (Wyo. 2004)
- *Davis v. Alaska*, 415 U.S. 308 (1974)
- *Greene v. McElroy*, 360 U.S. 474 (1959)
- *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)
- *United States v. DeSoto*, 950 F.2d 626 (10th Cir. 1991)
- *Olden v. Kentucky*, 488 U.S. 227 (1988)
- *Person v. State*, 2004 WY 149, 100 P.3d 1270 (Wyo. 2004)
- *Schmidt v. State*, 2001 WY 73, 29 P.3d 76 (Wyo. 2001)
- *Gomez v. State*, 2003 WY 58, 68 P.3d 1177 (Wyo. 2003)
- *Geiger v. State*, 859 P.2d 665 (Wyo. 1993)
- *Moore v. State*, 2003 WY 153, 80 P.3d 191 (Wyo. 2003)
- *Justice v. State*, 775 P.2d 1002 (Wyo. 1989)
- *Miller v. State*, 2003 WY 55, 67 P.3d 1191 (Wyo. 2003)
- *Lowseth v. State*, 875 P.2d 725 (Wyo. 1994)
- *Johnston v. State*, 747 P.2d 1132 (Wyo. 1987)
- *Beaugureau v. State*, 2002 WY 160, 56 P.3d 626 (Wyo. 2002)
- *Barnes v. State*, 642 P.2d 1263 (Wyo. 1982)
- *Wheeler v. State*, 691 P.2d 599 (Wyo. 1984)
- *Gist v. State*, 766 P.2d 1149 (Wyo. 1988)
- *MacLaird v. State*, 718 P.2d 41 (Wyo. 1986)

- Porter v. State, 440 P.2d 249 (Wyo. 1968)
- State v. Diggs, 272 Kan. 349, 34 P.3d 63 (2001)
- State v. Manning, 270 Kan. 674, 19 P.3d 84 (2001)
- State v. Stevenson, 70 Conn. App. 29, 797 A.2d 1 (2002)
- State v. Walden, 69 Wash. App. 183, 847 P.2d 956 (1993)
- State v. Pitts, No. 47488-0-I (Wash. Ct. App. Div. 1 Dec. 24, 2001)
- Fisher v. State, 128 Md. App. 79, 736 A.2d 1125 (1999)
- State v. Emmett, 839 P.2d 781 (Utah 1992)
- State v. Casteneda-Perez, 61 Wash. App. 354, 810 P.2d 74 (1991)
- State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (N.M. Ct. App. 1990)
- People v. Berrios, 298 A.D.2d 597, 750 N.Y.S.2d 302 (2002)
- People v. Overlee, 236 A.D.2d 133, 666 N.Y.S.2d 572 (1997)
- State v. Morales, 198 Ariz. 372, 10 P.3d 630 (Ariz. Ct. App. 2000)
- State v. Pilot, 595 N.W.2d 511 (Minn. 1999)
- State v. Singh, 259 Conn. 693, 793 A.2d 226 (2002)
- Earll v. State, 2001 WY 66, 29 P.3d 787 (Wyo. 2001)
- Valerio v. State, 527 P.2d 154 (Wyo. 1974)
- Simmons v. State, 2003 WY 84, 72 P.3d 803 (Wyo. 2003)
- Williams v. State, 2002 WY 136, 54 P.3d 248 (Wyo. 2002)